CANADIAN HUMAN RIGHTS COMMISSION
COMMISSION CANADIENNE DES DROITS DE LA PERSONNE

Respect

Protection

Promotion

Equality

ANNUAL REPORT 2010

Canada

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CANADIAN HUMAN RIGHTS COMMISSION
COMMISSION CANADIENNE DES DROITS DE LA PERSONNE

Jennifer Lynch, Q.C.
Chief Commissioner

Jennifer Lynch, c. r.
Présidente

March 2011

The Honourable Noël A. Kinsella
Speaker of the Senate
The Senate
Ottawa, Ontario K1A 0A4

Dear Mr. Speaker:

Pursuant to section 61 of the *Canadian Human Rights Act* and section 32 of the *Employment Equity Act*, I have the honour to transmit the 2010 Annual Report of the Canadian Human Rights Commission to you for tabling in the Senate.

Yours sincerely,

Jennifer Lynch, Q.C.

Jennifer Lynch, Q.C.

Encl.

c.c.: Mr. Gary W. O'Brien
Clerk of the Senate and Clerk of the Parliaments

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March 2011

The Honourable Peter Milliken, M.P.
Speaker of the House of Commons
House of Commons
Ottawa, Ontario K1A 0A6

Dear Mr. Speaker:

Pursuant to section 61 of the *Canadian Human Rights Act* and section 32 of the *Employment Equity Act*, I have the honour to transmit the 2010 Annual Report of the Canadian Human Rights Commission to you for tabling in the House of Commons.

Yours sincerely,

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c.c.: Ms. Audrey O'Brien
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CHIEF COMMISSIONER'S MESSAGE

Everyone has the right to be treated equally. This fundamental principle is so firmly entrenched in our democratic values that it is often taken for granted.

Canada's human rights record is among the best in the world. We are, for the most part, a compassionate and welcoming country, and we communicate our values through our connections to communities and businesses around the globe. Our strong belief in equality, dignity and respect is part of our national identity.

Yet, many people in Canada are still unable to fully participate in Canadian society simply because of *who* they are.

Living conditions in many First Nations communities represent some of the most pressing examples of inequality in Canada today. Recent reports from both government and non-governmental organizations confirm that many people living on reserve still do not have access to life's most basic necessities.

When Parliament repealed section 67 of the *Canadian Human Rights Act* in 2008, it was an important step towards acknowledging and addressing many of the challenges facing First Nations. Prior to that, people living under the *Indian Act* were excluded from our human rights legislation. Since 2008, more than 700,000 people living on reserve have had the right to file human rights complaints against the Government of Canada. As of June 2011, they will have the same right to file complaints against First Nations governments.

In anticipation of this coming change, the Commission is raising awareness among First Nations people about their rights under the *Canadian Human Rights Act*. At the same time, we are offering our expertise to organizations that are interested in preventing discrimination in Aboriginal communities and places of work and in developing or improving community based dispute resolution processes.

This initiative is part of the Commission's broader approach to preventing discrimination. The Commission works with organizations operating in every province and territory to promote diverse, inclusive and respectful workplace cultures. The Commission's new Human Rights Maturity Model has begun to help organizations improve their ability to prevent and address human rights-related issues. A pilot test is nearly complete and we will soon share the model with organizations across the country.

Our discrimination prevention programs are informed by the Commission's policies and research projects. The growing complexity of our world continues to have implications for how we understand human rights law. Through ongoing research and policy development, the Commission continues to develop a better understanding of how emerging issues might affect workplaces, service providers and society as a whole.

At the centre of the Commission's work is its responsibility for receiving and resolving discrimination complaints. The Commission continues to provide an independent dispute resolution process for people who feel that they have been discriminated against because of race, religion, disability or any other of the eleven grounds specified in the Act.

In some instances, the Commission refers complaints to the Canadian Human Rights Tribunal for further examination. The Commission often intervenes on behalf of the public interest. The Commission takes on this responsibility when it sees an opportunity to clarify or advance the law, or prevent future discrimination.

The complaints that come to the Commission demonstrate that while equality, dignity, and respect are strong Canadian values, discrimination still exists. People still have to speak up for their rights.

Canada is considered a world leader in human rights, because we have the processes to address discrimination and provide access to justice. Canada can also attribute its strong human rights record to the network of organizations that promote human rights and support marginalized members of society. These organizations serve as human rights defenders, and play a vital role in maintaining and improving human rights in Canada.

United Nations Human Rights Day in 2010 highlighted the contributions of human rights defenders and emphasized the importance of government support for their work. In recent years, some human rights defenders working in Canada have lost that support. As a result, it may become more difficult for society to support Canadians whose rights have not been respected.

Citizens share a common responsibility to speak out against discrimination and exclusion.

The people who work for the Commission take this responsibility very seriously, both as public servants and as Canadians. I am inspired by their passion, enthusiasm and professionalism. It is a privilege to lead a group so dedicated to promoting the values of equality, dignity and respect.

Jennifer Lynch, Q.C.

Jennifer Lynch, Q.C.
Chief Commissioner
Canadian Human Rights Commission

THE COMMISSION

Legislation

The Canadian Human Rights Commission's founding legislation inspires a vision for Canada in which "all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have," free from discrimination.

The Commission leads the administration of the *Canadian Human Rights Act* and ensures compliance with the *Employment Equity Act*. Both laws apply to federal government departments and agencies, Crown corporations, and federally regulated private sector organizations.

The *Canadian Human Rights Act* prohibits discrimination on the grounds of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

The *Employment Equity Act* promotes equality in the workplace for the four designated groups: women, Aboriginal peoples, persons with disabilities and members of visible minorities.

Mandate

The Commission promotes the core principle of equal opportunity and works to prevent discrimination in Canada by:

- promoting the development of human rights cultures;
- understanding human rights through research and policy development;
- protecting human rights through effective case and complaint management; and
- representing the public interest to advance human rights for all Canadians.

Commission members

A full-time Chief Commissioner acts as the Chief Executive Officer and leads the Commission. A full-time Deputy Chief Commissioner and four part-time Commissioners support the Chief Commissioner.

Commission operations

The Secretary General guides the daily operations of 189 employees. The Commission's operating budget was $22.5 million (2010-2011 fiscal year).

Distinguishing between the Commission and the Tribunal

The Canadian Human Rights Commission and the Canadian Human Rights Tribunal are separate and independent organizations. The Commission refers complaints to the Tribunal when it determines that further examination is warranted. The Tribunal holds public hearings. Parties involved in the complaint can present their arguments and call witnesses. The Tribunal determines whether there has been discrimination based on a prohibited ground. If appropriate, the Tribunal may order a remedy.

THE YEAR IN REVIEW

The Canadian Human Rights Commission has a broad mandate. Two priorities guided the Commission's work in 2010:

1. To work with First Nations to develop and increase their capacity to address human rights issues within their own communities.
2. To provide organizations with the tools and information necessary to create a self-sustaining human rights culture.

Activity Highlights

Promoting the development of human rights cultures

This year the Commission began pilot testing the Human Rights Maturity Model. The Maturity Model is a roadmap to help organizations create a positive, self-sustaining human rights culture in the workplace. It encourages employers to develop human rights competence to foster a culture of equality, dignity and respect. The Commission worked with a committee composed of stakeholders and union representatives to design the Maturity Model. Six organizations (including the Commission itself) are participating in the pilot project.

In November, the Commission held its 2010 Discrimination Prevention Forum in Winnipeg, Manitoba. The Forum provided an opportunity for the Commission to work with stakeholders to raise awareness of the employment barriers experienced by Aboriginal peoples. Participants also addressed issues related to the United Nations Declaration on the Rights of Indigenous Peoples, the balancing of individual and collective rights, and the importance of recognizing Indigenous legal traditions and customary laws.

Understanding human rights through research and policy development

The Commission released the Framework for Documenting Equality Rights. This tool, the first of its kind, examines social and economic well-being from a human rights perspective. It will provide reliable and relevant data to create policies and programs aimed at achieving equality for all Canadians.

In June 2011, full human rights protection will become available to all First Nations people living on reserves. In its original form, the *Canadian Human Rights Act* excluded these individuals for matters flowing from the *Indian Act*, under section 67. This section was repealed by Parliament in 2008. However, First Nations communities were given a three-year transition period to prepare for this change. As part of its work to support the transition, the Commission increased its understanding of how to make its complaint process more culturally relevant to Aboriginal peoples. The Commission conducted research on First Nations legal traditions and customary laws, and individual and collective rights. This research included discussions with the Indigenous Bar Association, Aboriginal Elders and other stakeholders affected by the repeal of section 67 of the *Canadian Human Rights Act*.

Protecting human rights through effective case and complaint management

The Commission screens discrimination complaints from anyone who works for, or receives services from, the federal government or federally regulated organizations such as banks, transportation and telecommunications companies.

In 2010, the Commission:

- received 1,435 potential complaints;
- accepted 853 complaints;
- referred 166 complaints to alternate redress;
- approved 177 settlements;
- dismissed 139 complaints; and
- referred 191 complaints to the Canadian Human Rights Tribunal for further examination.

Representing the public interest to advance human rights for all Canadians

The Commission participates in cases to represent the public interest when the decision has the potential to clarify, influence, shape or define human rights law. In 2010, the Commission intervened in half of the cases before the Canadian Human Rights Tribunal.

Important Human Rights Events in 2010

The United Nations Convention on the Rights of Persons with Disabilities

In March, Canada ratified this UN Convention. In signing the Convention, Canada promised to protect, promote and advance the rights of people with disabilities. Many Canadians played an active role in drafting the Convention and were among the leaders of the international movement that brought it to fruition.

Working with UN partners, the Commission also participated in the creation of the Convention. The Commission contributed its expertise in the protection, promotion and monitoring of human rights.

The Convention urges that states designate qualified bodies, such as the Commission, to monitor the Convention's implementation. The Government of Canada has not yet declared how it will fulfill this requirement. The Commission would welcome this responsibility.

The United Nations Declaration on the Rights of Indigenous Peoples

In November, the Government of Canada endorsed this UN Declaration. The Declaration, approved by the United Nations in 2007, speaks to the individual and collective rights of Indigenous peoples.

When endorsing the Declaration, the government stated that it was reaffirming "...its commitment to build on a positive and productive relationship with First Nations, Inuit and Métis peoples to improve the well-being of Aboriginal Canadians, based on our shared history, respect, and a desire to move forward together."[1]

The Commission is pleased that the Government of Canada has chosen to support the Declaration. It will be important for Canada to take action to ensure the rights expressed in the Declaration become a reality for Aboriginal peoples.

Bill C-3: *Gender Equity in Indian Registration Act*

In December, Bill C-3 *Gender Equity in Indian Registration Act* received Royal Assent.

This bill is a result of the British Columbia Court of Appeal's ruling in the case of *McIvor v. Canada* that sections of the *Indian Act* are unconstitutional. The *Gender Equity in Indian Registration Act* ensures that eligible grandchildren of women who lost status as a result of marrying non-Indian men are entitled to register as Indians. As a result approximately 45,000 people are entitled to registration.[2]

Amendments to the *Indian Act* based solely on the *McIvor* decision may not be broad enough. Residual discrimination relating to status and band membership will continue to exist. The Commission believes that a systematic review of the *Indian Act* is needed. Such an approach is preferable to the current piece-meal, complaint driven process.

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1 Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples, http://www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp

2 Data from Indian and Northern Affairs Canada, http://www.ainc-inac.gc.ca/br/is/bll/index-eng.asp

INCREASING AWARENESS OF RIGHTS AND RESPONSIBILITIES

The Commission works with federally regulated organizations and First Nations communities to promote diverse, inclusive and respectful cultures.

This section discusses how the Commission's programs help people prevent discrimination and resolve disputes when they occur.

The **National Aboriginal Initiative** has been working with First Nations and other Aboriginal stakeholders to prepare for the full repeal of section 67 of the *Canadian Human Rights Act*.

The **Human Rights Maturity Model** is a roadmap to help organizations create a self-sustaining human rights culture built on equality, dignity and respect.

The **Employment Equity Audit Program** ensures that organizations implement practices to achieve equality in the workplace for women, members of visible minorities, Aboriginal peoples and persons with disabilities.

The National Aboriginal Initiative

In June 2011, First Nations people affected by the *Indian Act* will have full access to Canadian human rights law for the first time in history.

For more than 30 years, section 67 of the *Canadian Human Rights Act* prevented First Nations people from filing discrimination complaints resulting from the application of the *Indian Act*. During this time, complaints on those matters could not be brought against the Government of Canada or First Nations governments. When section 67 was repealed in 2008, the *Canadian Human Rights Act* was immediately applicable to the Government of Canada. First Nations governments were given a three-year transition period. June 2011 marks the end of this transition period.

The Commission's National Aboriginal Initiative has worked to raise awareness of the *Canadian Human Rights Act* within First Nations communities. This includes strengthening the Commission's relationship with First Nations communities and providing information to First Nations governments as they prepare for their new responsibilities.

In 2010, the Commission participated in a wide range of regional dialogue sessions organized by the Assembly of First Nations and the Congress of Aboriginal Peoples. The Commission also collaborated with the Native Women's Association of Canada to develop educational material to improve people's understanding of their rights.

The Commission heard from many Chiefs and band council members who asserted that the *Canadian Human Rights Act* should not apply to their communities, because it conflicts with their inherent right to self-government. The Commission also heard from people who stressed the need for independent bodies to address human rights issues.

Finding the balance

First Nations have long advocated the right to self-government. This includes all matters that are integral to their unique cultures, identities, traditions, languages and institutions.

The Commission supports First Nations' inherent right to self-government. That is why the Commission is offering its expertise to First Nations communities interested in developing or improving their own dispute resolution processes.

When any individual can raise any human rights issue with confidence that it will be respectfully heard and responsibly addressed within the community, the number of complaints that come to the Commission will be reduced. This will also increase the autonomy and accountability of First Nations governments.

With over 600 First Nations communities affected by this change, it is important for each community to be able to tailor the process to meet its specific needs.

The Commission participated in events organized by the Indigenous Bar Association and other stakeholders to propose guiding principles for community-based dispute resolution processes. These principles were designed to support the creation of dispute resolution processes that are fair, accessible, independent, impartial and culturally relevant. Successful systems are also sensitive and responsive to the special situation of groups such as women, children and people with disabilities.

The National Aboriginal Initiative is working with the Southern First Nations Secretariat to develop community-based dispute resolution processes. The path that they follow could serve as a model for other communities interested in creating similar processes. The results of the research will provide lessons and best practices to share with other First Nations wanting to follow the same path.

The Commission will continue to advise First Nations as they create or refine the dispute resolution processes needed to meet their new legal responsibilities.

Guiding Principles for Community-Based Dispute Resolution Processes

1. Make the process accessible.
2. Obtain community input about the process.
3. Make sure the decision-maker knows about human rights.
4. Ensure impartiality and independence.
5. Allow people to bring a representative.
6. Give people the opportunity to be heard.
7. Encourage people involved to share information.
8. Keep information confidential.
9. Give reasons for decisions.
10. Ensure the process is acceptable to everyone involved in the dispute.
11. No retaliation.

Understanding the *Canadian Human Rights Act*

The Commission produced a human rights guide for First Nations and Aboriginal people entitled: Your Guide to Understanding the *Canadian Human Rights Act.* It is intended to help people better understand their rights and responsibilities under the *Canadian Human Rights Act.* It also outlines the process for filing a discrimination complaint with the Commission.

The Human Rights Maturity Model

The Commission is applying its knowledge and expertise to a new tool to help organizations create more inclusive and respectful workplaces. It is called the Human Rights Maturity Model. The first of its kind, the Maturity Model shows organizations *how* to create a positive self-sustaining workplace culture that encourages equality, dignity and respect.

A healthy work environment can enhance motivation, increase productivity and improve the recruitment and retention of employees. Organizations with outstanding corporate cultures are reportedly experiencing success and continue to outperform their counterparts in virtually all areas of business.[3]

Six federally regulated organizations, including the Commission itself, have begun pilot testing the Maturity Model.

These employers have recognized the intrinsic value of diversity, inclusiveness and respect in the workplace. Moving beyond their legislative obligations, these employers have begun to shape their workplaces by implementing policies and practices that promote these objectives.

Organizations involved in the pilot project have different motivations. For some it is to be proactive and provide prevention education. For others it is to confirm that current discrimination prevention policies are on track; and for others still, participation provides the opportunity to improve employee satisfaction and retention.

By pilot testing the Maturity Model, these organizations are able to prioritize existing initiatives and measure the effectiveness of the steps they have taken to reinforce their corporate culture.

Influencing and shaping the culture of an entire organization is a complex and challenging undertaking. Each organization is unique and no single method will work for all. The Maturity Model can be adapted to fit any organization.

"What led us to participate in the Maturity Model pilot project is that we are convinced that fostering a safe, respectful, inclusive environment is not only the right thing to do, it's good for business."

Barbara King
Bell Aliant

"Having a diverse workforce that is representative of our customers and Canadian society strengthens our organization by offering different perspectives, new ideas and new ways of doing things."

Nadine Hakim
Farm Credit Canada

3 Financial Post, "Culture starts at the Top," Thursday, Nov. 18, 2010 http://www.nationalpost.com/todays-paper/Culture+starts/3846461/story.html

How does the Maturity Model work?

The Human Rights Maturity Model helps organizations create and sustain a workplace culture based on equality, dignity and respect. It is a step-by-step process that improves an organization's capacity to prevent and address human rights-related issues.

There are five key areas to focus on when building an organization's competency in human rights management:

1. Leadership and accountability.
2. Capacity building and resources.
3. Alignment of policies and processes.
4. Communication and consultation.
5. Evaluation for continuous improvement.

These elements create the foundation for a respectful workplace that supports an organization's human rights responsibilities.

The Maturity Model organizes the five elements into manageable steps. The "steps" are five levels of maturity, each with indicators and outcomes.

The indicators help an organization identify its current level of maturity for each element. In turn, this allows the organization to identify and prioritize its needs.

The outcomes at each level help an organization determine when it has reached that level and monitor progress. This approach also allows organizations to easily tailor the Maturity Model to their distinct needs.

The objective of the Maturity Model is for organizations to continually improve their competency within each of the five elements. Organizations that reach level five have learned how to achieve, and have implemented, an inclusive and sustainable workplace culture.

Employment Equity

The Commission is responsible for ensuring that federally regulated organizations comply with the *Employment Equity Act*. This includes approximately 550 private sector employers in banking, telecommunication, transportation and other federally regulated industries, and approximately 100 public sector departments and agencies.

The Commission conducts compliance review audits to determine if these employers are meeting their obligations under the *Employment Equity Act*. Meeting these obligations involves implementing proper practices to achieve equality in the workplace for the four designated groups: women, members of visible minorities, Aboriginal peoples and persons with disabilities.

The Commission has improved its Employment Equity Compliance Program so that it takes into account an employer's success rate and the specific challenges associated with its industry.

The program is making it easier for organizations to introduce a human-rights-based culture by helping employers reach their employment equity objectives and discover the advantages that come with greater representation of designated groups.

This year the Commission completed 53 Employment Equity Audits. Of these, 21 organizations met the requirements of the *Employment Equity Act*. The other organizations are taking additional action to comply with the Act.

The purpose of employment equity is to achieve equality in the workplace so that no person is denied employment opportunities or benefits for reasons unrelated to ability. The *Employment Equity Act* clearly specifies that the obligation to implement employment equity does not extend to the point of hiring or promoting unqualified people. It is intended to correct the employment disadvantages experienced by women, Aboriginal peoples, persons with disabilities and members of visible minorities.

Employment equity standards help employers eliminate discrimination

Embracing employment equity and inclusiveness has a number of benefits for employers. Achieving employment equity objectives can help organizations become employers of choice in their industry.[4] Employees in diverse workplaces have higher rates of job satisfaction, which can facilitate recruitment and retention. Increasingly, businesses with solid diversity practices are becoming leaders in their field.[5]

Discrimination complaints cost time and money and can negatively affect employee morale and productivity. One of the best ways to avoid discrimination complaints is to have and implement inclusive workplace policies. Employers can create an inclusive work environment by reviewing employment systems, policies, practices and removing any employment barriers. This can provide access to an expanded pool of qualified and highly skilled workers, giving employers a competitive advantage.

Employment equity is just one piece of the discrimination prevention puzzle. By combining the principles of employment equity with the steps of the Human Rights Maturity Model, the Commission is working with employers and service providers to maximize the tools at their disposal to prevent discrimination.

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4 Davis, Shirley A and Eric C. Peterson, *Building the Business Case for Diversity* May, 2008, http://mldc.whs.mil/download/documents/Business%20Case/Business%20Case%20for%20Diversity%20SHRM%20%5BCompatibility%20Mode%5D.pdf

5 Lockwood, N. "Workplace diversity: leveraging the power of difference for competitive advantage" June 2005, http://findarticles.com/p/articles/mi_m3495/is_6_50/ai_n14702678/

HUMAN RIGHTS ISSUES IN 2010

Discrimination complaints that the Commission refers to the Canadian Human Rights Tribunal are often systemic in nature. Systemic discrimination refers to situations where people are treated differently and adversely because of an established policy or practice.

Systemic discrimination cases are often connected to changes taking place in the broader social context. The Commission analyzes Canadian social and demographic trends, and the complaints it receives to better understand and anticipate how issues might affect human rights law and practice.

The Commission also identifies complaints that have the potential to clarify, influence, shape or define human rights law. The Commission participates in these cases before the Tribunal to represent the public interest.

This section highlights some of the current issues being raised by complainants that will have a significant impact on human rights law.

Inclusion for Persons with Disabilities

Issue

People with disabilities continue to encounter barriers that prevent their full participation in Canadian society.

What Happened

James Peter Hughes complained to the Commission because his polling station was not accessible to people who could not use stairs. The Commission referred the complaint to the Tribunal for further examination.

Outcome

The Tribunal found that Elections Canada had accessibility policies in place. However, they had not been properly implemented. The Tribunal ordered Elections Canada to put systems in place to ensure accessibility for all voting Canadians.

Quick Fact

In 2010, 372 of the 853 complaints (44%) accepted by the Commission were related to disability, more than any other ground in the *Canadian Human Rights Act*.

In 2008, James Peter Hughes, a person with impaired mobility, encountered a polling station that did not provide access to people with disabilities and thus obstructed his ability to exercise his right to vote. His complaint exposes an issue affecting all Canadians with disabilities.

Because of his mobility impairment, Mr. Hughes uses a walker. When he arrived at his polling station, a long flight of stairs blocked access to the voting booths. He looked for a ramp, but found only a locked door. Determined to vote, and with no other alternative, Mr. Hughes went down the stairs on the seat of his pants.

Mr. Hughes complained to the Elections Canada voting officer. The officer explained that Elections Canada did not have the funding to provide accessible voting locations for a by-election.

Mr. Hughes filed a formal complaint to Elections Canada. He also filed a complaint with the Commission. His complaint alleged that Elections Canada had discriminated against him by not ensuring that his polling station was accessible.

The Commission referred the case to the Canadian Human Rights Tribunal. The Council of Canadians with Disabilities participated in the Tribunal hearing as an "interested party."

The Tribunal found that Elections Canada did have policies demonstrating their commitment to accessible voting and equal access to all polling stations. These policies had not been properly implemented.

The Tribunal ordered Elections Canada to put systems in place to ensure accessibility for all voting Canadians.

Elections Canada consulted with Mr. Hughes, the Council of Canadians with Disabilities and the Commission as the organization:

- developed tools and processes to ensure accessibility standards;
- implemented procedures to receive and process complaints; and
- trained their staff on all policies.

Discussion

The best way to avoid creating barriers for people is to carefully consider the needs of everyone from the outset. The 2007 Supreme Court of Canada decision involving the Council of Canadians with Disabilities and VIA Rail confirmed that service providers have a duty to be inclusive.[6] This means including everyone from the beginning, whether designing a building, establishing a policy, or developing new technology.

6 Council of Canadians with Disabilities v. VIA Rail Canada Inc., 2007 SCC 15, [2007] 1 S.C.R. 650 http://scc.lexum.org/en/2007/2007scc15/2007scc15.html

The Supreme Court's decision is in-line with the United Nations Convention on the Rights of Persons with Disabilities. The Convention acknowledges that inclusion is one of the keys to ensuring that people with disabilities are able to fully participate in society.

Inclusive Policy Development

The Commission encourages all employers and service providers to apply the following approach when developing policies.

1. Establish the policy.

Most organizations already have policies to be inclusive and prevent discrimination.

2. Test for potential discrimination.

Test the policy or practice to determine if it treats certain people differently *and* adversely. Ensure that relevant data are collected during testing.

3. Adjust the policy.

Examine ways to adjust policies to eliminate or mitigate any discrimination.

In general, if policy adjustments cannot be made, alternative arrangements should be considered. Employers should consult with those negatively affected by the policy. This will help to determine the most appropriate course of action.

If health, safety or cost issues can be demonstrated, a policy that is potentially discriminatory may still be justified. It is important to fully document these situations. This includes recording the evidence that led to the decision.

Prepare employees to prevent discrimination. Ensure they are aware of the potential human rights implications of a particular policy.

4. Monitor for unexpected discrimination.

It may not be possible to identify or predict all the situations that may lead to discrimination. Despite careful planning and testing, issues may still arise once a policy is in place. Ongoing monitoring and analysis is necessary.

Mandatory Retirement and Age Discrimination

Issue

Canada's population is aging at an unprecedented rate. This demographic shift is changing our understanding of aging and retirement in Canada.

What Happened

Air Canada pilots, George Vilven and Robert Kelly complained to the Commission after they were forced to retire at age 60. The Commission referred the complaints to the Tribunal for further examination.

Outcome

The Tribunal ruled that the part of the *Canadian Human Rights Act* allowing mandatory retirement is a violation of the *Charter of Rights and Freedoms.* The Tribunal ordered Air Canada to reinstate the two pilots.[7]

Everyone has the potential to experience age discrimination. Vilven and Kelly v. Air Canada is the latest age discrimination case to be dealt with by the Tribunal.

George Vilven and Robert Kelly are two Air Canada pilots who were forced to retire at age 60, in-line with corporate policy. They filed complaints with the Commission arguing that this constituted discrimination on the basis of age. The Commission referred the complaints to the Tribunal.

The Tribunal ruled in their favour, stating that the part of the *Canadian Human Rights Act* allowing mandatory retirement is a violation of the *Canadian Charter of Rights and Freedoms.* Air Canada was ordered to reinstate the two pilots.

In its decision the Tribunal observed, "it is now clear that the workforce is aging and many individuals need and want to work past the mandatory retirement age. In light of this fact, it might be argued that *preventing,* rather than permitting age discrimination beyond the normal age of retirement has become a pressing and substantial need in society."

While this case was making its way through the Tribunal process, a similar debate was beginning in Parliament. Bill C-481 is a Private Members Bill tabled in Parliament in 2010. If the Bill receives Royal Assent it would amend the *Canadian Human Rights Act* to prohibit federally regulated employers from setting a mandatory retirement age.

7 At the time of publication, the pilots had been reinstated, but the case had been sent back to the Tribunal for re-examination.

Discussion

The Tribunal ruling in the Vilven and Kelly case, and Bill C-481 illustrate that the social values and beliefs around age are changing. So too, is the concept of retirement. According to a recent Scotiabank study, 70% of Canadians who intend to retire plan to work during their retirement.[8]

All the provinces and territories that had mandatory retirement clauses in their human rights legislation have already repealed them.[9] The Commission supports the repeal of this section of the *Canadian Human Rights Act.*

Quick Facts

It is estimated that by next year, approximately 41% of working Canadians will be between the ages of 45 and 64. By 2021, 17.9% of the population will be 65 and over, and by 2041 this group will account for an estimated 23% of the population.[10]

Data collected from the Commission's Dispute Resolution Branch, suggests that age discrimination has already started to have a significant impact on Canadian workplaces. This past year, 227 of the 853 complaints (27%) accepted cited age as one on the grounds of discrimination.

Discrimination on the basis of age is prohibited by the *Canadian Charter of Rights and Freedoms.* However, the *Canadian Human Rights Act* permits employers to end an individual's employment "...because that individual has reached the normal age of retirement for individuals working in positions similar to the position of that individual."

Over the past five years, the Commission referred 273 complaints of age discrimination to the Canadian Human Rights Tribunal. Almost all were related to mandatory retirement.

Supporting Aboriginal Children

Issue

First Nations child welfare agencies maintain they cannot provide the same level of support to families in crisis as agencies serving families off reserve, because of discrepancies in funding.

What Happened

The Assembly of First Nations and the First Nations Child and Family Caring Society of Canada filed a complaint with the Commission because First Nations child welfare organizations receive less funding than agencies serving children off reserve. The Commission referred the complaint to the Tribunal for further examination in 2009.

Outcome

The case is currently before the Tribunal.

The Assembly of First Nations has long stated that First Nations child welfare organizations are under funded compared to agencies serving non-First Nations children. As a result, a greater proportion of First Nations children are being placed in foster care—often outside their communities—than in the general population.

The Assembly of First Nations and the First Nations Child and Family Caring Society of Canada filed a complaint with the Commission against Indian and Northern Affairs Canada. The complaint alleges that the formula for funding First Nations family service organizations discriminates against these agencies on the basis of race.

The Commission referred the case to the Canadian Human Rights Tribunal. This was the first complaint related to the *Indian Act* to go to the Tribunal, since Parliament repealed section 67 of the *Canadian Human Rights Act* in 2008. The Commission has taken an active role in the Tribunal hearings to represent the public interest.

The Attorney General challenged the jurisdiction of the Tribunal to hear the case. The Attorney General argues that the provision of funding to First Nations child welfare organizations is not a "service" as defined in the *Canadian Human Rights Act.*

A ruling is expected in 2011.

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8 "Majority of Canadians Expect to Work After Retirement, Primarily to Stay Mentally and Socially Active: Scotiabank Study" http://www.cnw.ca/en/releases/archive/January2011/04/c7837.html

9 CBC News "Mandatory Retirement fades in Canada" http://www.cbc.ca/canada/story/2009/08/20/mandatory-retirement-explainer523.html

10 Data from Human Resources and Skills Development Canada: Labour, http://www.hrsdc.gc.ca/eng/lp/spila/wlb/aw/09overview_analysis.shtml

Discussion

The Tribunal's decision may have an impact on a wide range of government-funded programs and services. Similar objections to Commission jurisdiction have already been raised regarding the system for status registration and the border crossing process for Aboriginals.

If it is determined that these services do not fall under the jurisdiction of the *Canadian Human Rights Act,* people in Canada may no longer be able to file discrimination complaints in relation to services provided by the government.

Family Status

Issue

Changing family structures and an aging population are creating new challenges and pressures for families. Employers have a duty to accommodate employees in these situations.

What Happened

Fiona Johnstone complained to the Commission because her childcare needs were not accommodated by Canada Border Services Agency, her employer. The Commission referred the complaint to the Tribunal for further examination.

Outcome

The Tribunal ordered Canada Border Services Agency to end discriminatory practices and develop a plan to prevent future discrimination based on family status.

With changing family structures and an aging population the need for accommodation is a reality experienced by many modern families.

In Canada, federally regulated organizations have a duty to accommodate employees when they are adversely affected based on one of the grounds of discrimination covered by the *Canadian Human Rights Act.*

Fiona Johnstone worked for Canada Border Services Agency. She was responsible for processing goods and travellers coming into Canada. The job involved working rotational shifts with irregular hours and unpredictable overtime requests.

After having her first child, Ms. Johnstone could not find childcare outside normal business hours. Ms. Johnstone's husband also worked irregular shifts and often travelled for business.

She approached her employer and explained that she could only find childcare three days a week. She asked for a set three-day week of 13-hour shifts to maintain her full-time status.

Her request was denied on the basis that 13-hour shifts went against health and safety regulations. Her employer offered her three 10-hour shifts with a fourth shift of four hours. Ms. Johnstone accepted the set three-day week of 10-hour shifts, but declined the fourth shift. She explained to her employer that it was not practical or cost effective to find childcare for the four-hour shift.

Ms. Johnstone filed a complaint with the Commission in 2004. She alleged that the Canada Border Services Agency had discriminated against her on the ground of family status.

In her complaint, Ms. Johnstone alleged that Canada Border Services Agency's policies had forced her to work part-time hours. As a part-time employee, she lost benefits, such as her pension entitlements, that she had received as a full-time employee.

The parties were unable to resolve the issue. The Commission referred the case to the Canadian Human Rights Tribunal for further examination.

Evidence submitted to the Tribunal showed that Ms. Johnstone had often worked extended shifts that involved overtime. The Tribunal determined that there were no practical health and safety concerns to stop Ms. Johnstone from working 13-hour shifts.

The Tribunal found that Canada Border Services Agency did not evaluate whether it could accommodate Ms. Johnstone's family responsibilities, to the point of undue hardship, as is required by the *Canadian Human Rights Act.*

The Tribunal ordered Canada Border Services Agency to end discriminatory practices. The Agency was also required to develop a plan to prevent future discrimination based on family status. The plan must include written policies that cover individual assessments of family status requests.

Discussion

The duty to accommodate requires an employer or service provider to take steps to eliminate the different *and* adverse treatment of individuals, or groups, protected under the *Canadian Human Rights Act.*

An employer's duty to accommodate extends only to the point of undue hardship. This means that accommodation may not be required if it would cost too much or create risks to health or safety.

In these instances, employers are required to demonstrate *why* accommodation is not possible. Documenting specific situations and collecting reliable data is necessary to prove that undue hardship exists.

The Commission advises and assists employers to develop flexible accommodation policies that can be adapted to meet the unique needs of each situation. This approach enables managers and supervisors to take the initiative and ensure employees are offered appropriate accommodation.

LOOKING AHEAD

Canadian society is constantly being reshaped by cultural, social, economic and technological changes. The Commission consults with stakeholders, conducts research and analyzes human rights complaints to identify and improve our understanding of human rights issues. These activities support the Commission's efforts to raise awareness and address human rights issues that impact Canadian society.

In addition to our ongoing initiatives described in this report, below are some of the key initiatives that the Commission will be working on in future years.

Mental Health

A growing number of the disability complaints received by the Commission are for mental health reasons. In fact, 27% of the disability complaints received by the Commission in 2010 were related to mental health. The Commission is working with the Mental Health Commission of Canada to identify partnership opportunities. The objective is to promote awareness of the connection between mental health disabilities and human rights, reduce the related stigma and prevent discrimination.

Measuring Equality Rights in Canada

The Commission is developing the first report on equality rights in Canada. This report will provide a comprehensive picture of the equality-related issues facing people in Canada.

The Human Rights Impact Assessment

The Commission is partnering with Canada's national security agencies to test its new Human Rights Impact Assessment guidelines. A Human Rights Impact Assessment is good strategic planning. This tool assists organizations to identify and eliminate potential discriminatory practices at the planning stage. The proactive approach supported by this instrument will help organizations be inclusive from the start. In turn, this will reduce the need to retrofit policies to accommodate people after the fact, saving organizations time and money.

RESOURCES

Canadian Human Rights Act
http://laws.justice.gc.ca/en/h-6

Employment Equity Act
http://laws.justice.gc.ca/en/e-5.401/index.html

Canadian Charter of Rights and Freedoms
http://laws.justice.gc.ca/en/charter/1.html

Canadian Human Rights Tribunal
http://chrt-tcdp.gc.ca

United Nations Convention on the Rights of Persons with Disabilities
http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf

United Nations Declaration on the Rights of Indigenous Peoples
http://www.un.org/esa/socdev/unpfii/en/drip.html

Bill C-3: *Gender Equality in Indian Registration Act*
http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=4901865&file=4

McIvor v. Canada
http://www.canlii.org/en/bc/bcca/doc/2009/2009bcca153/2009bcca153.html

Indian Act
http://laws.justice.gc.ca/en/I-5/

Your Guide to Understanding the Canadian Human Rights Act
http://www.chrc-ccdp.gc.ca/publications/naichract_loicdpina/toc_tdm-eng.aspx

Hughes v. Elections Canada
http://chrt-tcdp.gc.ca/search/files/t1373_10308e120210.pdf

Council of Canadians with Disabilities v. VIA Rail
http://scc.lexum.org/en/2007/2007scc15/2007scc15.html

Vilven & Kelly v. Air Canada
http://chrt-tcdp.gc.ca/search/files/t1176_5806ed081110.pdf

Bill C-481: *An Act to amend the Canadian Human Rights Act and the Canada Labour Code (mandatory retirement age)*
http://www2.parl.gc.ca/legisinfo/index.asp?Language=E&query=6917&Session=23&List=toc

Johnstone v. Canada Border Services
http://chrt-tcdp.gc.ca/search/files/t1233_4507ed060810.pdf